THE CRIMINAL BAR ASSOCIATION OF ENGLAND & WALES

Criminal Bar Association response to the proposed amendments to the Very High Cost Case contracts (VHCCs)

1. The Criminal Bar Association (the 'CBA') represents the views and interests of practising members of the criminal Bar in England and Wales. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and promote and represent the professional interests of its members. The CBA is the largest specialist Bar association ('SBA'), with over 4,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

2. We welcome the opportunity to respond to the Legal Aid Agency's (LAA's) consultation on the amendments to the Very High Cost Case contracts ("VHCC"). Whilst we respond to this consultation paper, we note that the Criminal Bar Association was consulted in relation to the proposed amendments to the 2008 Panel Advocates VHCC contract ("the 2008 Contract"), it has not been consulted

in respect of the 2010 VHCC contract for self-employed advocates ("the 2010 Contract") and the 2013 VHCC contract for self-employed advocates ("the 2013 Contract"). This is despite the fact that the Criminal Bar Association is a Specialist Bar Association and that its' membership are those practitioners directly affected by the proposed changes.

Executive Summary

3. The proposed contractual amendments, are to allow for the rates of payment under a VHCC contract, to be removed from the body of the contract and instead to be set out in Statutory Instruments. The new rates of payment under the Statutory Instruments, will amount to a 30% reduction to the current contractual payment rates. These amendments will apply to both existing contracts and future contracts.

4. Notice of the proposed amendments and the laying of the Statutory Instruments containing the new payment rates by the Ministry of Justice ("MoJ"), is scheduled to take place on the 4 November 2013, with the changes coming into effect on 2 December 2013. All work carried out on or after that date, under the 2008, 2010 and 2013 contracts will be at the new rates. The LAA relies on different clauses in respect of each of the contracts, which it asserts entitles them to amend the rates of payment.

5. The MoJ suggests that a reduction of 30% will lead to a saving of **£20 million** annually. Assuming this figure is accurate, this in all probability means that **the actual spend** on VHCCs is closer to **£60 million** and not **£92 million** as claimed by the MoJ. This is an example of misleading and inaccurate figures being advanced as a basis for these proposals. We urge the MoJ to release up to date figures about expenditure so that a well-founded and fair assessment of the extent of further cuts can be made against an objective set of figures rather than the morass that are currently being advanced.

6. This lower figure is perhaps not surprising as the rates for VHCCs were reduced in July 2010 by 5% and the qualifying criteria were modified to reduce the number of cases which come within the VHCC scheme. Contract managers have also applied a much more restrictive approach to the hours they will allow for case preparation. These significant changes, were not retrospective or immediate, and so will have had a limited impact upon VHCC spend in the financial year (2011/12). The £20million savings figure may therefore reveal the extent to which significant savings have already been made to the VHCC scheme. If this analysis is broadly accurate then actual expenditure is already much lower than is being suggested.

7. As the CBA and the Bar Council has contended before, the contracting and payment processes for cases currently falling into the VHCC regime are unnecessary, inefficient, administratively consuming (of time and resources) and full of perverse incentives. The cumbersome and complex nature of these processes has been created by Government and the Civil Service. The whole scheme has proved itself to be not fit for purpose. The added layer of management by the Legal Services Commission has cost far more than paying advocates a fair fee to conduct a VHCC case. It cannot be right that Barristers have to argue for hours in order to conduct what is required in order to prepare a case for trial with a contract manager sometimes taking up an inordinate length of time for both sides.

8. Contract managers are invariably not lawyers and have no real understanding of the case. It is quite usual to say counsel can read and absorb a document in 15 seconds, an exhibit in 30 seconds, regardless of the amount of detail on it.

9. The analysis upon which the Ministry of Justice relies for the effect of a 30% cut is flawed. The effect will not fall upon the highest paid advocates, but upon the junior Bar, whose work will be taken by those senior juniors fleeing from a 30% cut;

    i. The figure of 30% is plucked out of thin air. There is no evidence that a 30% cut will improve the credibility of the system. There is also a danger

of a tipping point after which the level of fees paid to defenders becomes so low that confidence in the system is damaged;

ii. There is no evidence that the Ministry of Justice has considered whether a reduction by 30% would have an effect upon the number of 'providers' prepared to make themselves available for VHCC work;

iii. The daily rate and hourly rate in serious fraud is low e.g. for an experienced junior on a category two fraud the rate includes two hours of preparation. A reduction in rates would result in advocates choosing not to conduct more difficult and complex work because its rate of pay is so poor compared with the time invested; and

iv. The number of 'providers' has already been restricted by the tendering process and length of contracts. Whilst new providers could be accredited at any point, there is no evidence that they would wish to do so at the new rates.

10. The CBA is confident that its members will NOT work at these new rates. They have expressed the same in response to a CBA questionnaire issued to Heads of Chambers.

The 2008 Contract

11. The terms of the clause(s) that it is said entitle the proposed amendments to take place, are different as between the 2008, and 2010 and 2013 Contracts.

12. The 2008 Contract was with the Legal Services Commission ("LSC"). This was a statutory corporation established under Part 1 of the Access to Justice Act 1999. The amendment clause can be found at Clause 25.2, which provides:

"Ongoing changes – from us

25.2 We may make such amendments to this Contract ***as we consider necessary in the circumstances to comply with, or take account of, any U.K. legislation*** *or any EU legislation having direct effect, or as a result of any decision of a U.K. court or tribunal, or a decision of the European Court of Human Rights or of the European Court of Justice or any other institution of the European Union, or to comply with the requirements of any regulatory body or tax or similar authority. Such amendments may include (without limitation) changes to payment provisions, imposing controls not previously imposed, and amending procedures in the Contract". [emphasis added]*

13. The purpose of this clause was to allow the LSC to make amendments so as to give effect to UK legislation with which it was required to comply, or of which it was required to take account. Such amendments being required to give effect to acts of a third party such as Parliament. This was clearly intended to refer to primary legislation rather than delegated legislation. What it was not intended to facilitate, either expressly or impliedly, was to allow a party to the contract (such as the LSC or such equivalent) to unilaterally alter the terms of the contract by itself laying a Statutory Instrument before Parliament. The MoJ of which the LAA forms a part intends to do exactly that. The Statutory Instrument would therefore not have the effect which it is intended to have. The MoJ has no contractual power under the 2008 Contract to effect any reduction in the rates of remuneration of Panel Advocates working under that Contract.

14. This is supported by the fact, that the amendment clauses in the 2010 and 2013 Contracts, namely Clause 13.4, were initially identically worded to the amendment Clause 25.2 in the 2008 Contract. However, in April 2013, Clauses 13.2 and 13.3 were introduced into the 2010 and 2013 Contracts; they go much further and provide as follows:

"Amending the Contract to reflect the Lord Chancellor's legislative changes
13.2 We may amend the Contract to reflect the Lord Chancellor's legislative changes as set out at Clause 13.3.

13.3 The Lord Chancellor's legislative changes include:

(a) any changes the Lord Chancellor may make to Legal Aid Legislation pursuant to:
(i) section 2(3) of the Act (regulations making provision about the payment of remuneration by the Lord Chancellor to persons who

provide services under arrangements made by the purposes of Part 1 of the Act);

(ii) section 9 of the Act (orders modifying Schedule 1 to the Act);

(iii) section 11 of the Act (criteria for qualifying for civil legal services);

(iv) section 12 of the Act (determinations);

(v) any power to make secondary legislation under Part 1 and 4 of the Act; and

(b) any changes the Lord Chancellor may make to other legislation, including by way of Statutory Instrument as defined in the Statutory Instruments Act 1946 (as amended), which we reasonably believe requires a change to how Contract Work is undertaken and paid for".

15. The power to amend is extended to permit the Lord Chancellor's legislative changes pursuant to specifically identified delegated legislation. Had the amendment Clause 25.2 been sufficient, these new Clauses would not have needed to be added. No doubt the MoJ effected these changes as they were aware of the limitations of Clause 25.2.

16. In conclusion:

    a) There is no power to amend the 2008 Contract as proposed;

    b) Any attempts to reduce the rates of payment to advocates under that Contract would be a repudiation of that Contract; and

    c) The advocate would be entitled to bring that Contract to an end.

The 2010 and 2013 Contracts

17. We do not at this stage argue the validity of the mechanism by which the MoJ seeks to make the proposed amendments to the 2010 and 2013.

18. Contractual right to terminate:

    a) Where there has been an amendment made by the LSC/LAA pursuant to the powers granted to it under the 2008, 2010 and 2013 Contracts, there

is an express right vested in the advocate who does not wish to accept the amendment, to give notice to terminate the Contract;

b) Notice to terminate may be given by the advocate at any time after notice is given of the intended amendment;

c) Termination would take effect the day before any such amendment comes into effect; and
d) Up to the date of termination, work will continue to be done at the existing contract rate and all unpaid work will be required to be paid at that existing rate.

Professional obligation of advocates

19. In the Ministry of Justices' Consultation Paper – "*Transforming Legal Aid: Next Steps (2013)"* at paragraph 367, was written:

"Even after a 30% reduction VHCCs will remain high value, long duration cases that bring certainty of income for providers, which is important, particularly for self-employed advocates. For that reason, in addition to their professional obligations to clients, we do not consider there is a significant risk that advocates will return briefs or that solicitors will exercise their unilateral right of termination under their VHCC contracts."

20. This statement infers that there is a professional obligation on advocates such that they have no right to terminate despite the unilateral amendment, or if they do they would have to continue to act without recourse to payment (pro bono). Both can properly be described as extraordinary propositions.

21. The Bar Standards Board, *Guidance on Rules 608,609 and 610 of the Code of Conduct: Withdrawal from a case and return of Instructions* (2012), states as follows:

"The position if the nature of Counsel's remuneration is changed

9. The BSB takes the view that if there is a material change made to the basis of Counsel's remuneration, his original instructions have been withdrawn by the client and substituted by an offer of new instructions on different terms".

22. In other words this is not a 'return' of the brief by the advocate, but a significant change in remuneration, which amounts to a 'withdrawal' of instructions. The offer of new instructions on different terms is something which the advocate is entitled to refuse.

Impact of proposed amendments

23. In excess of 16,000 responses were received by the Government in response to its consultation paper. The vast majority of which opposed the proposed cuts given the history of persistent cuts to legal aid funding. The suggestion that these cases even with such a reduction remain high value and are unlikely to be returned, is simply wrong. The CBA is confident that individuals currently undertaking such work will withdraw from the case. They have expressed the same in response to a CBA questionnaire issued to Heads of Chambers.

24. In those circumstances the proposed amendments are likely to have disastrous consequences:

    i. If a trial is part heard, juries will have to be discharged and justice delayed;

    ii. Even if a trial has not commenced, any work completed under the Contract would have to be re-done by a new 'provider' (assuming that there would be one to take up the case);

    iii. There would thereby be double payment;

    iv. Any trial date would have to be put back;

v. Any victims pending giving evidence, or families of victims, would find justice delayed;

vi. Credibility in the system would not be increased quite the reverse; and

vii. Far from saving money it will cost money.

Objection to the manner in which it is proposed to make the amendments

25. The CBA adopts the Bar Council response and its objection to the manner in which it is proposed to amend the terms of each of the 2008, 2010 and 2013 Contracts. In their present form, the payment rates under each Contract are set out as part of the Contract concerned. The LAA intends not to replace those rates within each Contract with the reduced rates provided for in the proposed Statutory Instruments, but rather to remove from the Contracts any recitation of rates whatsoever and to replace them instead merely with a reference to the Instrument itself where those reduced rates are to be found. As a matter of construction of each Contract, such an amendment is impermissible. It is neither "necessary…to comply with, or take account of, any UK legislation" (the 2008 Contract) nor does it "reflect the Lord Chancellor's legislative changes" (the 2010 and 2013 Contracts). What would be contractually permissible (in accordance with the passages quoted in the previous sentence) would be to substitute within each Contract the reduced rates themselves. This is not an arid point, but one of real substance. The Bar Council is concerned that, if the amendments proceed in the manner currently proposed, the LAA will be able to avoid future consultation over any further changes to payment rates, by making those changes under the same Instrument (by the mechanism of an Amending Order). The Bar Council is not prepared to be excluded from future consultation on the rates of pay for its barrister members in this way (or, indeed, at all).

Conclusion

26. Finally we remind the MoJ and the LAA of the important ministerial duties under the Access to Justice Act 1999, namely that ministers must provide remuneration which guarantees a suitably qualified body of advocates to do the work. These proposed measures are contrary to this duty.

27. We urge that a halt is brought to the unnecessary haste to introduce these measures. Complete and accurate figures should be provided as to both the actual spend and savings required. This document sets out the legal and professional implications of maintaining this course. Money will not be saved but the changes incur far greater costs.

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